In the Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 277.

RUDOLF HELWIG,
Plaintiff in Error,

vs.

THE UNITED STATES.

Brief for Plaintiff in Error.

This cause comes before this Court on a certificate from the United States Circuit Court of Appeals for the Second Circuit.

Statement of the Case.

In February and March, 1895, Rudolf Helwig, the plaintiff in error, imported at the port of New York certain wood pulp, and entered the same at the Custom House.

The duty then imposed by law on wood pulp was 10 per centum *ad valorem* (Paragraph 303, Act of August 28, 1894).

There were three separate importations and Helwig, upon making the Custom House entries, declared the value of the wood pulp to be Marks

191 per ton; the aggregate declared and entered value was equivalent to $13,252 and Helwig, at the time of making the entries paid to the collector of customs the sum of $1,352, being the amount of duty then imposed by law upon wood pulp, at the rate of 10 per centum of the declared and invoice value.

The merchandise was appraised by the United States appraiser, as provided by Section 7 of the Act of June 10, 1890 (26 Stat. at Large, 131), who reported the market value of this particular wood pulp to be Marks 263.70 per ton, instead of the Marks 191 per ton as declared by Helwig. Thereupon Helwig requested a re-appraisement by a United States general appraiser, in accordance with the provisions of Section 13 of the Act of June 10, 1890 (*supra*); the re-appraisal having been had, the general appraiser re appraised the market value at Marks 245 per ton, net; Helwig appealed to the Board of United States general appraisers, in accordance with the statute above cited, and thereafter that Board affirmed the re-appraisal of the general appraiser, namely, deciding that the foreign market value of said wood pulp was Marks 245 per ton; thereby showing that the merchandise had been undervalued by Helwig by over twenty-seven per centum.

Upon this final re-appraisal, which is declared by the statute to be final and conclusive as to the dutiable value of such merchandise against all parties interested therein (Section 13, *supra*), the collector of customs re-liquidated the entries, fixing the aggregate dutiable value of such merchandise at $16,792.20, and, computing the duty imposed thereon by law, at the rate of 10 per centum *ad valorem*, at $1,679.20, made demand upon Helwig, for the sum of $354.00, being the difference between the amount already paid by Helwig ($1,-

325.20) and the sum of $1,679.20; thereafter Helwig paid the said sum of $354.00, so that the entire amount of the 10 per centum *ad valorem* duty imposed by law on this wood pulp has been paid and is not now in question in this case.

But at the time when the collector of customs found the sum of $354.00 to be due from Helwig, he also claimed that there was due from Helwig to the United States, on this wood pulp, the further sum of nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68), and made demand for that amount also, such amount being the "further sum in addition to the duties imposed by law," ascertained and fixed by the collector of customs as provided by Section 7 of the Act of June 10, 1890 (*supra*), being two per centum of the total appraised value of the wood pulp, for each one per centum by which such appraised value exceeded the entered value (page 2, folio 3). That section provides, among other things:

> "And if the appraised value of any article of imported merchandise shall exceed by more than ten per cent. the value declared in the entry, there shall be levied, collected and paid, *in addition to the duties imposed by law on such merchandise, a further sum*, equal to two per cent. of the total appraised value for each one per cent. that such appraised value exceeds the value declared in the entry."

The duty imposed by law on this merchandise was $1,679.20; all of which Helwig paid. The "further sum" demanded *in addition to the duty imposed by law* on this merchandise was $9,067.68.

Before this action was commenced Helwig duly presented his petition to the United States District Court for the Southern District of New York, claiming that the said sum of Nine

thousand sixty seven dollars and sixty-eight cents ($9,067.68) was a penalty, and praying that the District Judge would cause an investigation of the facts to be made, in accordance with Section 5,292, of the Revised Statutes, and Sections 17 and 18 of the Act of June 22, 1874 (18 Stat. at Large, 186), and cause the facts to be stated and transmitted to the Secretary of the Treasury, and praying that the said penalty be remitted on the ground that it had been incurred without willful negligence or intent to defraud (page 2, folio 3).

Thereupon the District Judge caused such summary investigation to be made and a statement of the facts appearing thereon was duly forwarded to the Secretary of the Treasury, who, thereafter, and on the 6th day of July, 1898, found and decided that said penalties had been incurred without willful negligence or intention of fraud on the part of Helwig, and, thereupon, the Secretary mitigated the said penalties to one-half the amount thereof, namely, $4,533.84 (Page 2, folio 4).

Thereupon the Collector of customs again re-liquidated the entries in question, reducing the amount of the "further sum in addition the duties imposed by law," to $4,533.84, and made demand upon Helwig for payment of the reduced amount. As, however, Helwig did not pay the amount demanded, an action was begun against him for the recovery of the $4,533.84, in the United States Circuit Court for the Southern District of New York, on the 24th of August, 1898. Upon learning of the pendency of that action the Secretary of the Treasury advised the collector of customs at New York that he (the Secretary) revoked his decision of July 6th, 1898, by which he had mitigated the penalty, and directed the collector to re-liquidate the entries at

the original amount, and to request the United States attorney to institute suit for the full amount of the penalty, namely, Nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68), (page 2, folio 4).

The collector followed these instructions and again re-liquidated the entries accordingly (page 2, folio 4).

The United States thereupon discontinued the first action for the $4,533.84, and commenced another action, again in the Circuit Court, against Helwig for the sum of $9,067.68, and it is in this latter action that this certificate comes before this Court.

The case was tried at the Circuit Court upon an agreed statement of facts.

Upon the reading of the statement of facts, the plaintiff in error moved to dismiss the complaint and for the direction of a judgment in his favor upon the ground that the action was to recover a penalty or penalties arising under the customs laws, and that under the provisions of sections 629 and 563 of the Revised Statutes, the United States Circuit Court had no jurisdiction in such an action (page 3, folio 4).

The motion was denied and the plaintiff in error duly excepted.

The Court subsequently directed judgment in favor of the United States for the sum of $9,067.68, together with interests and costs (page 3, folio 5).

The plaintiff in error thereafter sued out his writ of error to the United States Circuit Court of Appeals for the Second Circuit (page 3, folio 5).

Thereupon the Circuit Court of Appeals, stating that the sum for which judgment was rendered, namely, $9,067.68, was the "further sum" accru-

ing "in addition to the duties imposed by law," upon wood pulp, under the provisions of Section seven of the Act of June 10, 1890, certified the following question to this Court, namely:

Question.

Has the United States Circuit Court jurisdiction of an action to recover the aforesaid "further sum" accruing "in addition to the duties imposed by law," under the provisions of Section seven of the Act of June 10, 1890 (26 Statutes of Large, 131)? (page 3, folio 5).

Argument.

The plaintiff in error contends that the question certified should be answered in the negative of the ground,

(*a*) That the "further sum" imposed for undervaluation "in addition to the duties imposed by law" upon imported merchandise, is a *penalty* and not a customs *duty*, and,

(*b*) That actions to recover penalties arising under the customs laws, are not within the jurisdiction of the United States Circuit Court, but are solely within the jurisdiction of the United States District Court.

The question presented by this certificate brings before this Court a controversy of great importance both to the government and to many importers, and an answer in the affirmative would necessarily have far reaching consequences.

For many years this Court, the Treasury Department, the Attorney General and importers, have understood, said and believed that amounts accruing as this amount accrued, were

penalties; great sums of such amounts thus accruing have been treated as penalties and have been remitted as such, and none of those sums so remitted have ever been paid into the Treasury.

The present attitude of the United States however, as shown in this case, is that such amounts are not penalties, but are merely ordinary customs duties or imposts.

They must necessarily be one or the other; there is no middle ground. There is no such thing known properly to the law as a "penal duty;" no statute imposes a penal duty, nor, indeed, could there be such a "duty" under the Constitution.

If, then, the United States is correct in its contention that they are merely "duties," it necessarily follows that all the remissions which have heretofore been made of such amounts were absolutely void; that those sums, so attempted to be remitted, are still due and owing to the United States; that those amounts can be recovered by the United States; that those importers who have been, and are now resting secure in the belief that their accounts with the Government are settled, are, nevertheless, still liable to pay; for it requires no argument to show that no statute of limitation will prevent such a recovery, and no erroneous action on the part of any collector of customs or any Secretary of the Treasury in remitting these sums, can bind the United States.

On the other hand, if the sums be penalties, as is here urged by the plaintiff in error, and as has been repeatedly held by this Court, then they were properly remitted, and no such unfortunate consequences as above indicated need follow.

In support of the contention of the plaintiff in error, reference will be had not only to the statute

itself, but to many decisions of this Court, as well as inferior Federal Courts, to the opinions of learned Attorneys General, and to the practice of the Treasury Department for many years.

POINT ONE.

The United States Circuit Court has no jurisdiction of an action to recover penalties arising under the customs laws.

U. S. Revised Statutes, Section 629.
U. S. Revised Statutes, Section 563.
United States vs. *Mooney*, 116 U. S., 104.
Lees vs. *United States*, 150 U. S., 476.

Section 629 of the Revised Statutes of the United States provides as follows:

> "Section 629. The Circuit Courts shall have "original jurisdiction: * * *
>
> "Fourth. Of all suits at law or in equity, "arising under any act providing for revenue "from imports or tonnage, * * * *except* "*suits for penalties* and forfeitures."

Section 563, R. S., also provides:

> "Sec 563. The District Courts shall have "jurisdiction as follows: * * *
>
> "Third. Of all suits for penalties or for- "feitures incurred under any law of the United "States."

United States vs. Mooney (116 U. S. 104) is directly in point and is controlling, even if there were any doubt about the meaning of the language

of the sections of the Revised Statutes above quoted. That was an action at law brought in the Circuit Court to recover of the defendant $20,000, the value of certain merchandise imported by him, which it was alleged he had forfeited because he had made an entry of the same by means of false and fraudulent invoices.

The defendant moved to dismiss the suit for want of jurisdiction to entertain it; the motion was granted and the United States appealed to the United States Supreme Court.

Upon the appeal the United States conceded that the exclusive jurisdiction of all suits for penalties and forfeitures under the customs laws of the United States continued in the District Courts until the passage of the Act of March 3, 1875, and that it still so continued, unless that act gave concurrent jurisdiction of such suits to the Circuit Courts.

The Supreme Court, after quoting the language of the Statutes from 1789 to the time of the passage of the Revised Statutes, and the Act of March 3d, 1876, and calling attention to the fact that for over eighty-six years there had been no question but that the District Court had exclusive jurisdiction over an action to recover all penalties (except where jurisdictions had been given to the Circuit Courts in special cases) said:

> "The Act of 1875, it is clear, was not intended to interfere with prior statutes conferring jurisdiction upon the Circuit or District Courts in special cases and over particular subjects.
>
> Its purpose was to give the Circuit Courts a jurisdiction which the Federal Courts did not then possess * * * * and not to take away from the Circuit or District Courts jurisdiction conferred by prior statutes, or to divide the jurisdiction which had for so long

a time been vested exclusively in the District Courts.

Thus construed there is no conflict between Section 1, of the Act of March 3, 1875, and Section 9 of the Act of 1789, which conferred exclusive jurisdiction on the District Courts for penalties incurred under the laws of the United States. The latter section, however, except as modified by statutes conferring jurisdiction upon the Circuit Courts in special cases, still remains in force, and the Circuit Court was right in dismissing the case for want of jurisdiction."

So also in *Lees vs. United States* (150 U. S. 476) decided in 1893, the Supreme Court held:

"From the earliest history of the Government the jurisdiction over actions to recover penalties and forfeitures has been placed in the District Court.

"It is true that in some cases jurisdiction over matters of penalty and forfeiture has been committed to the Circuit Court, but this was always done by special Act, and does not otherwise affect the proposition that the general jurisdiction over actions for penalties and forfeitures has been and is vested in the District Court. Hence, when, as here, a statute imposes a penalty and forfeiture, jurisdiction of an action therefor, would rest in the District Court, unless it is in express terms placed exclusively elsewhere."

The Court also cited U. S. vs. Mooney, with approval.

There is no special statute giving the Circuit Court jurisdiction of an action to recover a penalty arising under the customs laws.

If therefore, this is a suit for a penalty, it is a suit of which the District Court alone has jurisdiction, and over which the Circuit Court has no jurisdiction.

POINT TWO.

The "further sum," levied under the provisions of Section 7, of the Act of June 10, 1890, is a penalty, arising under the customs revenue laws; it is not a customs duty.

Section 7, Act of June 10th, 1890.
Section 32, Act of July 24th, 1897.
Greely vs. Thompson, 10 How., 225.
Maxwell vs. Griswold, 10 How., 242.
Bartlett vs. Kane, 16 How., 263.
Ring vs. Maxwell, 17 How., 147.
Stairs vs. Peaslee, 18 How., 521.
Passavant vs. United States, 148 U. S., 214.
20 Opinions Attorney-General, 660.
4 Opinions Attorney-General, 183.

(*a*) Section 7, of the Act of June 10, 1890 (26 Stat. at Large, 131), after providing that the importer of merchandise, shall make and verify his entry at the Custom House, setting forth the true market value, directs that the collector shall cause the merchandise to be appraised; it then provides:

> "And if the appraised value of any article "of imported merchandise shall exceed by "more than ten per cent. the value declared "in the entry, there shall be levied, collected "and paid, *in addition to the duties imposed "by law* on such merchandise, *a further sum*, "equal to two per cent. of the total appraised "value for each one per cent. that such ap- "praised value exceeds the value declared in "the entry."

The duty imposed by law on wood pulp was, at that time, ten per centum, *ad valorem* (paragraph 303, Act of August 28, 1894).

Therefore, under the provisions of existing law, the United States was entitled to demand and receive from Helwig, ten per centum of the value of the wood pulp which he had imported, and it had a lien upon the merchandise for that amount *but no more;* it had a claim against Helwig personally for that amount, *but for no more;* if Helwig paid the ten per centum "duty" imposed by law, he discharged fully the lien and claim, and thereupon became entitled to the immediate and absolute possession of the goods.

The statement of facts, contained in the certificate, shows that the valuation of the merchandise in question was $16,792.00 (page 2, folio 3); the duties imposed by law thereon amounted to $1,679.20, and no more; Helwig had paid $1,325.20 on account of those duties (page 2, folio 3), thereby leaving a balance of $354.00 due to the United States as duties, payment of which sum would, of course, discharge all liens and claims of the United States for "duties" on those particular importations; had the collector failed to deliver them upon payment he would have been liable for conversion. (*Conrad vs. Pacific Insurance Co.*, 6 Peters, 278, at 281.)

The reason why Helwig did not pay the $354.00 on entry was because he valued his merchandise in his invoices at less than the appraising officers subsequently valued it; but no matter what the value may be, the *duty* was ten per centum *ad valorem* and no more; therefore the only "duty" to which the United States was entitled, in addition to what had been paid, was the sum of $354.00, and that sum has since been duly paid (page 2, folio 3.)

In addition, however, to the *duties* imposed by law upon the merchandise the statute declares that "a further sum" shall be imposed, in certain cases

where it shall be found that there has been an undervaluation of the imported merchandise.

That "further sum" so imposed "in addition to the duties imposed by law," becomes due only when there has been some wrongful act of the importer; it is only levied when it appears that he has falsely stated the dutiable value of the goods which he has imported; its manifest purpose is to deter or prevent importers from under-stating the value of their goods, and to punish them if they attempt in that manner to evade the *duties* imposed by law; it is the "compensation of a violated law" (*Bartlett vs. Kane*, 16 How., 263).

A "penalty" has been defined to be "the punishment inflicted by a law for its violation" (*Bouvier*, "*Penalty*"). In this particular case it is conceded that technically Helwig violated the law, in that he failed to declare the value of his merchandise at the value which the Government appraisers subsequently declared to be the correct value; in so doing he omitted to pay $354 00 of the duties imposed by law on wood pulp. Therefore, under the statute, he is to be punished because of his violation of the law, and that statute declares that his punishment shall be that he must pay *in addition to the duties imposed by law*, the sum of nine thousand and sixty-seven dollars and sixty-eight cents. He must pay "a further sum" of over two thousand five hundred per centum of the amount of duties which it is alleged he sought to evade by undervaluation.

Manifestly, this enormous sum is not a "duty"; it is not imposed as such, nor does it possess any of the characteristics of a duty. It is not a fixed tax levied upon imported goods, but it is more or less an elastic fine levied in addition to the fixed tax. It is not imposed for purposes of revenue, nor for protection of home industries. It is a

sum which may never become due, although goods are constantly being imported, because all such importations may be correctly valued, and, therefore, be liable only to the uniform fixed burden imposed upon them by law. It is not fixed or determined except by the degree of culpability of the importer; the greater the percentage of his undervaluation, the greater the amount of the "further sum" which he must pay in addition to the duties. If that degree of undervaluation shall exceed forty per centum, then

> "the entry may be held to be presumptively fraudulent, and the collector of customs may seize the merchandise and proceed as in cases of forfeiture for violation of the revenue laws.
>
> "And in any legal proceedings which may result from such seizure the fact of such undervaluation shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same and forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient evidence" (Section 7, *supra*).

This statute provides three methods or forms of punishment for a particular violation of law, measuring the degree of punishment according to the culpability of the offender.

The *offense* is the undervaluation of imported merchandise. The *punishment* is:

> (*a*) If the undervaluation be under 40 per centum, the offender must pay a sum of money; if he show the absence of willful negligence or intent to defraud, the Secretary of the Treasury may remit;
>
> (*b*) If the undervaluation be more than 40 per centum the goods may be seized and for-

feited, and the fact of the undervaluation is presumptive evidence of fraud; and unless he rebut the presumption by sufficient evidence, forfeiture shall be adjudged;

(*c*) If the undervaluation be knowingly and willfully made, the offender shall be punished by a fine of $5,000 or by imprisonment for two years, or both (Sections 6 and 9).

Here Congress has devised a plan of graded punishments for a specific kind of an offense, ranging from a mere amercement, to loss of goods or their value, and finally to imprisonment.

Can it reasonably be said that the nature of the wrong varies in the three cases mentioned? Is not the wrongful act the same throughout?

Can it reasonably be said that in (*a*) the punishment is merely the exaction of an "extra" or "additional" customs duty or impost or tax, while in (*b*) and (*c*) we enter the field of crime and punishment for crime?

The dividing line between (*a*) and (*b*) is so slight that it seems most unreasonable to say that in one case we have a crime and in the other merely the imposition of a tax. There can be no distinction in principle between an undervaluation of thirty-nine per centum, or less, and forty per centum or more. Yet it is the law that in the former case the offender pays a sum of money; in the latter his entry is presumptively fraudulent and his goods must be forfeited, unless he rebut the presumption; *and it is merely one per centum variation in the amount of the undervaluation that changes the form of the punishment.* But can that one per centum variation also change the character of the offense? May that slight difference in percentage determine whether the importer is merely called upon to pay an extra tax, or that

he is called upon to prove himself or his goods guiltless of a crime?

The case is analogous to the distinction which exists, under many state statutes in respect to larceny; the punishment varies in *degree* according to the *amount* or value of the thing stolen; but the *wrong* is the same in either case. If, as under the New York statute, the *wrong* is petit larceny, the punishment may be a fine merely; but if grand larceny it must be imprisonment.

For purposes of illustration let it be assumed for the moment that Congress had fixed upon 35 per centum undervaluation, instead of 40 per centum, as the dividing line. In that event, according to the original appraisement in this case, Helwig's entries would have been presumptively fraudulent, and his goods would have been forfeited, unless he rebutted the presumption, because the undervaluation there shown was over 37 per centum while, according to the final re-appraisement, he would have been innocent of fraud, because the undervaluation was there shown to be only 27 per centum but in either case Helwig's *offense* was the same; the punishment only varied.

Nor is there any lack of proportion in respect to the punishments inflicted under (*a*) and (*b*) respectively. Under (*a*), in Helwig's case, the penalty amounts to 54 per centum of the value of his merchandise; if the undervaluation had been 40 per centum, the penalty would have been 80 per centum, but instead of exacting the penalty of 80 per centum, the United States under (*b*), would have seized the merchandise, or, in other words, would have taken 100 per centum of the value from Helwig.

Congress has, therefore, prescribed a harmonious scheme of punishments for this offense, graded

carefully to accord with the extent of the wrong done.

And it is to be borne in mind that *all* the forms of punishment mentioned are *in addition to the duties imposed by law* on the merchandise.

In respect to (*a*) the statute so expressly declares, and in respect to (*b*) it has been recently so held in the United States Circuit Court of Appeals for the Second Circuit (*Gray vs. United States, 113 Fed. Rep., 213, and Baldwin vs. United States, 113 Fed Rep., 217*).

The Act of June 10, 1890, imposes no duty on wood pulp; nor does it impose any duty upon any merchandise. It is entitled "An act to simplify the laws in relation to the collection of the revenue." It is an administrative law, and relates to the *collection* of the customs revenue. But it is manifest that, so far as the provisions above mentioned are concerned, as well as others, it is a penal statute, and the punishments which it prescribes for violation of its provisions are criminal or quasi-criminal in their nature.

> *Boyd vs. United States, 116 U. S., 616 at 634.*

(*b*) It needs the citation of no authority to support the proposition that no officer of the Government has power to remit nor to waive the collection of customs duties.

Yet within the period of seven years, commencing January 1st, 1891, and ending October 31st, 1897, the various Secretaries of the Treasury have remitted hundreds of thousands of dollars of the "further sums," which had accrued under the provisions of paragraph 7 of the Act of June 10, 1890; they have instructed collectors of customs at various ports not to collect those "further

sums"; they have advised importers that they need not pay those accounts, and, in fact, they have not been paid. In their annual reports to Congress the various Secretaries of the Treasury have set forth in detail the amounts which they have so directed not to be collected.

(See Annual Reports to Congress of the Secretary of the Treasury, for 1895, Table V., pages CLVII to CLXI; for 1896, Tables S, page CLVII; for 1897 Table P page CXLI.)

In fact the collection of one half of the sum for which judgment was rendered in this very case was waived by the Secretary of the Treasury, as has already been stated.

The exact amount of these "further sums" which had been thus levied "in addition to the duties imposed by law," and the collection of which had been waived by the Secretary of the Treasury, during the period to which reference is made above, was, as shown by the official reports above quoted, $682,967.71 (See Summary, Appendix II. of this brief).

And this was not all; for it appears by the report for the year 1896 that the Secretary omitted to include therein any of these "further sums" which had accrued on importations of sugar in addition to the duties imposed by law, and had been waived by him, so that the actual amount waived was much greater than that above stated.

If these "further sums" were duties, then by what authority did the Secretary of the Treasury decide that they need not be paid into the Treasury of the United States? If they were *duties*, why did not the President and Congress, when they received the report of the Secretary stating that he had waived them, inquire by what

right he, a mere administrative officer, presumed to direct that duties imposed by law should not be collected?

But if it be admitted that these further sums are penalties, then clearly the Secretary had the right to remit them, no matter how large the amount.

The Statute under which the Secretary derived his power of remission is Section 5292, Revised Statutes, which provides that:

> "Whenever any person who shall have incurred any fine, penalty or forfeiture or disability * * * by authority of any provisions of law for imposing or collecting any duties or taxes * * * shall prefer his petition to the Judge of the district in which such fine, penalty or forfeiture or disability has accrued, truly and particularly setting forth the circumstances of his case, and shall pray that the same may be mitigated or remitted, the Judge shall inquire in a summary manner into the circumstances of the case * * * and shall cause the facts * * * to be stated * * * and direct their transmission to the Secretary of the Treasury. The Secretary shall thereupon have power to mitigate or remit such fine, forfeiture, or penalty, or remove such disability or any part thereof, if, in his opinion the same was incurred without willful negligence, or any intention of fraud in the person incurring the same, and to direct the prosecution if any has been instituted for the recovery thereof, to cease and be discontinued upon such terms or conditions as he may deem reasonable and just."

Section 5293, provides that the Secretary may

remit or mitigate a fine, penalty or forfeiture, in certain cases, without a petition having been first presented to the district court; for instance, where the amount is less than one thousand dollars, &c.

Sections 17 and 18 of the Act of June 22, 1874 (18 Stat. at Large, 186), known as the Anti-Moiety Act, are substantially the same as 5292 R. S.

Section 17 provides:

> "That whenever, for an alleged violation of the customs revenue laws, any person who shall be charged with having incurred any fine, penalty, forfeiture or disability, other than imprisonment * * * shall present his petition to the Judge of the district * * * &c.," then the summary inquiry shall take place.

Section 18 provides that the Judge may direct that the investigation take place before a United States Commissioner; then follows the provision as to the power of the Secretary:

> "To mitigate or remit such fine, penalty or forfeiture, or remove such disability, or any part thereof, if, in his opinion, the same shall have been incurred without wilful negligence or any intention of fraud in the person or persons incurring the same. * * * "
>
> Section 19 states that "It shall not be lawful for any officer or officers of the United States to compromise or abate any claim of the United States arising under the Customs Laws, for any fine, penalty or forfeiture incurred by a violation thereof. * * *
>
> *Provided, however*, that the Secretary of the Treasury shall have power to remit any fines, penalties or forfeitures, or to compromise the same, in accordance with existing law."

By these statutes Congress has committed to the discretion of the Secretary of the Treasury the power to remit or mitigate penalties, incurred under any law providing for imposing or collecting of any duties, &c., when, in his opinion, such penalties shall have been incurred without willful negligence or intention of fraud.

Therefore, it is manifest why it is that the hundreds of thousands of dollars of these "further sums," accruing under Section 7 of Act of June 10, 1890, have not been paid into the Treasury; because those "further sums" were *penalties* and not *duties*, and because the Secretary of the Treasury had power to remit and did remit those sums *as penalties*.

Clearly, then, if these "further sums," accruing "in addition to the duties imposed by law" be held to be *duties*, and not to be *penalties*, the Secretary of the Treasury who waived their collection, has himself violated the law; and as hereinbefore pointed out, the collectors of customs who have neglected or omitted to collect these sums, have also in their turn violated the law and they, or their bondsmen, are personally liable to the United States for the full amount of these sums of money which they have so neglected or omitted to collect; so also are all the importers personally liable to the United States for the amounts of these "further sums" which they have not as yet paid; for nothing is better settled than that the unlawful act or neglect of an officer of the United States does not bind the United States (*German Bank vs. United States, 148 U. S., at 579, and cases cited.*)

But if, as we contend, these sums are in fact penalties and not duties, then the Secretary was right in remitting them; no hardship to importers can result and it will be unnecessary to re-open the

transactions which both the Government and the importers have regarded as closed.

(*c*) It being manifest, therefore, that these "further sums" are *penalties*, and, as such, have been properly and legally remitted or mitigated under the provisions of R. S. 5292, and Sections 17 and 18 of the Act of June 22, 1874 (*supra*), it follows that they are also *penalties* under R. S. 563 and 629, under the well settled rule of construction that the Legislature will be presumed to have used words in their ordinary signification, unless the contrary appears, and that it will be presumed that a word is used in the same sense in different parts of the same act.

These "further sums" being penalties within the meaning of the remission sections of the Revised Statutes, they are also penalties within the sections which define the jurisdiction of the Circuit and District Courts; therefore, the Circuit Court has no jurisdiction of this action, but it should have been brought in the District Court.

(*d*) Before directing attention to the many adjudged cases which hold that these "further sums" are penalties, rather than duties, it is proper to note the distinction which exists between "duties" and "additional duties," as well as to point out that occasionally the last mentioned phrase has been applied improperly to these "further sums" now in question.

Custom duties are the taxes or imposts levied upon imported merchandise, and as such are required by the Constitution to be uniform throughout the United States (Section 8, Article 1). As is well known the custom is to embody in one act of Congress a great variety of merchandise, subject to a large number of different rates of "duty," and

the enacting clause of such acts usually declares that "there shall be levied, collected and paid," upon imported merchandise, "the rates of duty," specified in the accompanying schedules. These are the "duties" imposed, as that word is ordinarily understood.

It has frequently happened, however, that Congress has imposed, in addition to the ordinary "duty," a further or "additional" duty; that is to say a further uniform tax upon certain classes of merchandise, or goods coming from a particular place or in a particular kind of vessel, &c. These are the true "additional" duties. They are not levied nor do they accrue by reason of any neglect, omission or wrongful act of the importer, nor because of his failure to comply with any provision of law; they are in no sense a punishment, but are, on the contrary, uniformly levied and collected precisely as the regular duties are levied and collected. They are merely *additions* to the duties which have already been or are to be levied at the regular rates of duty prescribed by the various schedules.

The first imposition of this additional duty was in the Act of May 2d, 1792 (Section 4, 1 Stat. at Large, 259), which was an act for raising a further sum of money for the protection of the frontiers. It provided that after a date named,

> "there shall be levied, collected and paid in addition to the present duty thereupon, a duty of 2 1/2 per centum upon all goods, wares and merchandise (therein enumerated) which are now chargeable with a duty of five per centum *ad valorem*,"

and Section 14 of the same act (p. 362), provided

> "that the *additional duty* * * * specified

in the fourth section shall continue for the term of two years and no longer."

Other similar impositions of "additional duty" will be found in

Chap. XV, Laws 1797 (1 Stat. at Large, 533), where an "additional duty" was imposed on salt.

Chap. LXVI, Laws of 1800 (2 Stat. at Large, 84) which was an act entitled "An Act to lay *additional duties* on certain articles imported."

Chap. XLVI, Laws of 1804 (2 Stat. at Large, 291), which was an act to provide a fund to be used for the expenses, &c., in relation to the Barbary powers; this act provided for an additional duty of 2 1/2% *ad valorem*, and throughout Congress invariably refers to the "additional duty." This act was continued in force for a number of years by special acts to that effect.

Chap. CXII, Laws of 1812 (2 Stat. at Large 768), which was an act entitled "An Act for imposing *additional duties* upon all goods, wares and merchandise imported," &c. Section 1, provides "That an *additional duty* of one hundred per centum upon the permanent duties now imposed by law," &c., &c. Section 3, declares "That the *additional duties* laid by this act shall be levied and collected in the same manner, &c., &c., as the duties now in force."

So also, there is the familiar imposition of an additional duty of ten per cent. upon importations made in vessels not of the United States.

Laws of 1789, Chap. 2 (1 Stat. at Large, 26).

Laws of 1790, Chap. 39, Sec. 2 (1 Stat. at Large, 181).

Laws of 1794, Chap. 54, Sec. 4 (1 Stat. at Large, 392).

Laws of 1795, Chap. 17, Sec. 5 (1 Stat. at Large, 411).

And the imposition of the 10 per cent. additional duty upon goods imported from beyond the Cape of Good Hope.

Further citations of instances where Congress has used the words "additional duty" in their ordinary and proper meaning appear to be unnecessary. Enough has been shown to demonstrate that these "further sums" are in no sense "additional duties," nor "duties," and while Congress has the undoubted right to levy either, neither Congress nor the Courts nor the custom officers can make a penalty any the less a penalty, nor change its character as a punishment by describing it as an "additional duty" or as a "penal duty."

As has been said "the Supreme Court looked through the name at the substance of the thing, and found it to be still a penalty" (Opinion of Attorney General Olney, 20 Opinions, 660).

Authorities.

(*e*) In the foregoing it has been shown that the executive officers of the Government have regarded these "further sums" as penalties, and not as duties, and have acted accordingly; and that in so doing they were supported by reason and principle, as well as by the statute itself.

And there are many cases in the Supreme Court and in the Circuit Court which support that position.

A careful search of the reported cases has disclosed but one other instance where the United States has brought suit specifically for the "fur-

ther sum", imposed for undervaluation; *and in that case the suit was brought in the District Court.*

The reason for this scarcity of cases directly on this point is that heretofore the practice has been for the Collector to exact payment of the penalty, together with the increased duty, before delivering the goods; then the importer would bring his action to recover back the amount which he claimed had been improperly exacted.

United States vs. *Strauss* (55 Fed. Rep., 388), was an action against an importer to recover $348.-12, a penalty incurred under the provisions of Section 7 of the Act of June 10, 1890, and was properly brought by the United States Attorney in the *District* Court for the Southern District of Ohio.

The Court in directing judgment for the plaintiff on the ground that the defendant had taken none of the steps provided by law to secure a re-appraisal, said:

> "The surveyor assessed a *penalty* thereon in accordance with the provisions of Section 7 of the Act of June 10, 1890 * * * The *penalty* under this provision in this case is $348.12, being the amount sued for."

And whenever the Courts have had occasion to pass upon any question in connection with these further sums thus imposed for undervaluation they have been almost invariably termed "penalties;" sometimes "penal duty," but never a "duty."

Greeley vs. *Thompson*, 10 How., 225, was a case where the collector demanded and received over $6,600 as a penalty imposed upon the importer for undervaluation of certain iron. The importer paid the amount and then brought suit to recover

it back on the ground that the collector or appraiser had valued the merchandise improperly by taking the value at the time of exportation rather than at the time of procurement.

In the course of its opinion, this Court, in upholding the view of the importer and sustaining a judgment in his favor, said:

> "There is another objection in this case to the applicability of the Act of 1842, if construed to affix this *penalty* to an undervaluation of goods procured otherwise than by purchase." * * * "They thus appear to leave goods procured other ways than by purchase to the provisions of the Acts of 1823 and 1830, which do not at all affix the *penalty* here exacted. * * * Especially in a *penal* provision it could not seem judicious any more than legal, to extend it beyond the clear language of the Act. * * *
>
> The Government, too, could not suffer by the delay asked here, as they, in the meantime, would hold the goods unless the increased duties on the highest appraisal, *and the penalty* were paid to them."

Here the Court not only specifically terms the amount a penalty but states that the provision imposing it is a *penal* provision; and finally the Court most clearly distinguishes between the increased duty, due to the highest appraisal, and the penalty which results from the undervaluation.

In *Maxwell vs. Griswold*, 10 How., 242, the importer was not permitted to make an addition to his invoice in order to avoid the penalty provided by the 8th section of the Tariff Act of July 30, 1846 (9 Stat. at Large, 43), and, having paid the amount, brought his action to recover it back. In discussing the case the Supreme Court said:

> "The importer protested against this (the

action of the collector), but in order to avoid the *penalty*, under such a wrong appraisal adopted the following course:

"The importer knowing that this (failure to increase the valuation of his invoice) would subject him to a severe *penalty*, in order to avoid it, felt compelled to add to his invoice the amount. * * *

"He was unwilling to pay either the excess of duties or the *penalty*, and must be considered, therefore, as forced into one of the other by the collector. * * * "

The Court here keeps clearly in view the distinction between the increased (or excess) *duties* due to the increased valuation, and the further *penalty* which would accrue if it appeared that there was undervaluation.

Bartlett vs. Kane, 16 How., 263, is also an important authority on the proposition that these sums are not customs duties, but are penalties.

The Court there held that they could not be refunded as drawback upon the exportation of the merchandise, on the ground that the provision of law "for the return of the *duty* upon a re-exportation * * * does not include, in its purview, any return of the forfeitures or *amercements* resulting from illegal or fraudulent dealings on the part of the importer or his agents."

The facts there were that the merchandise had been advanced in value by more than ten per cent., thereby incurring the penalty or so-called "additional duty," provided by the 8th section of the Tariff Act of 1846 (9 Stats. at Large, at 74). The importer first filed an appeal against the appraisement and then withdrew it; he then paid under protest the increased duty and penalty for the undervaluation. Thereafter he exported a portion of the merchandise, and sought to obtain

a drawback not only of the increased duty, but of the penalty.

It will be observed that here, although the statute termed the amount an "additional duty," the Supreme Court ignored that fact, and looking at the substances rather than the form, held that it was not a duty but was an "amercement"; in other words, a penalty.

It is manifest, also, that had the so-called "additional duty" been really a duty, the importer under the then existing drawback laws would have been entitled unquestionably to a return of it, less the usual one per centum.

Passavant vs. *United States* (148 U. S., 214) arose under the act of 1890, and the Court there passed upon some of the provisions of that act to which reference has been made. The question involved was whether the Circuit Court had jurisdiction to review a decision of the Board of General Appraisers, as to the dutiable value of imported merchandise, and this Court held that such a decision was final and no review could be had, in the absence of fraud.

It was also claimed by the importers that the merchandise was not subject to the imposition of the "further sum" or so-called "additional duty," as provided by Section 7 (*supra*).

This Court held (page 221):

> "As stated by Mr. Justice Campbell, speaking for the Court, in Bartlett v. Kane, 16 How.,263, 274, such additional duties 'are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud.' They are designed to discourage undervaluation upon imported merchandise and to prevent efforts to escape the legal rates of duty. *It is wholly immaterial whether they are called additional duties or penalties.*

Congress had the power to impose them under either designation or character.

"When the dutiable value of the merchandise is finally ascertained to be in excess of the value declared in the entry by more than ten per centum, this extra duty or *penalty* attaches * * * in addition to the *ad valorem* duty provided by law. The importers in this case cannot be heard to complain of this additional duty or *penalty*. * * * "

The Court added that because the importers had received due notice of all the proceedings it could not properly be said that they had been subjected to *penalties* without notice, or had been deprived of their property without due process of law.

In a very large number of cases in the various Circuit Courts these "further sums" levied in consequence of undervaluation have been invariably called "penalties." Without referring to the details in each case, or to all of them, it is sufficient to cite the following:

Morris vs. Robertson, 37 Fed. Rep., 199.
Grinnel vs. Lawrence, 1 Blatch., 346.
Bannandahl vs. Redfield, 4 Blatch., 223.
Bischoff vs. Maxwell, 4 Blatch., 384.
Lehmaier vs. Maxwell, 15 Fed. Cases, 250 (not elsewhere reported).
Manhattan Gas Light Co. vs. Maxwell, 2 Blatch., 405.

In 1893 the Secretary of the Treasury requested the Attorney General for an opinion as to whether the "further sums" provided for by Section 7 of the Act of June 10, 1890, were penalties within the meaning of Sections 5292 and 5293 of the Revised Statutes and Sections 17 to 20 of the Anti-Moiety Act of June 22, 1874, Chapter 391 (20 Opinions Attorney General, 660).

After quoting from the various statutes in ques-

tion, Hon. Richard Olney, the learned Attorney General, says:

> "There is no doubt that if the 'additional 'duty' is a penalty, these provisions apply to the case, as they are to be construed as forming with the Act of 1890 one complete system of tariff legislation.
>
> On principle, it is clear that the so-called 'additional duty' is a penalty. It is not provided for the purpose of revenue. It is no less a penalty because proof of fraud or other willful misconduct is not a necessary preliminary to its infliction. It is in its essence a fine inflicted to promote honesty; nor is it less a penalty because it is called something else. The law looks at facts, not names. As will be shown, it was in fact called a penalty when it first appeared in the statute book. The results of the contrary construction would be most unreasonable and therefore to be avoided if possible. One result would be that the Secretary of the Treasury could remit when fraud was charged, otherwise not. If the increase of valuation on the appraisement amounts to 40 per cent. the goods may be seized for presumptive fraud, according to the express provisions of the law, and then the Secretary's power of remission attaches. If, however, the increase in valuation by the appraisement is between 10 and 40 per cent. only, then, according to the construction adopted by the Treasury Department, no seizure can be made unless there is some positive indication of fraud. If there are indications of fraud, there can be no remission, because there can be no seizure. Such intent should not be imputed to Congress except in a very clear case."

The learned Attorney General then proceeds to trace the history of the various statutes authorizing the imposition of this penalty and after an ex-

haustive analysis of the whole field of tariff legislation in respect to this question, he concludes:

> "I am therefore constrained to hold that, "being a penalty, it is subject to remission "like other fines, penalties and forfeitures."

(The full opinion from which the above quotations are made will be found in the Appendix to this brief.)

Moreover while the Act of 1842 was in force, the Secretary of the Treasury asked Attorney-General Legare whether he had power to remit the 50% penalty imposed by that Act.

The Attorney-General answered the question in the affimative (4 Opinions, 182) stating that he was "very clear that the 50 per cent. * * * was a penalty."

It has been shown that the Supreme Court, the Circuit Court, the Attorney General, the Secretary of the Treasury, have all directly and positively declared these sums to be penalties, and not to be duties, while we have also shown that the President and Congress have impliedly, at least, recognized and approved that proposition.

Therefore, it may be said, as was laid down by the Supreme Court in *Stairs vs. Peaslee* (18 How., 521, at 530):

> "And after that construction has been thus sanctioned, impliedly, in a judicial proceeding in this Court, *and acted on for so many years* (1846 to 1853) by all the parties interested, the Court thinks it ought to be regarded as settled and that what has been done under it ought not to be disturbed * * *."

It is necessary, however, to refer to the sole case where the contrary view was held by any of the Federal Courts.

United States vs. *Collier*, 3 Blatch., 325 (No. 14,833 Federal Cases), was an action involving the settlement of the accounts of Collier, who had been collector of Upper California from 1849 to 1851. The United States claimed that a balance of several hundred thousand dollars existed against Collier, who, in turn, claimed offsets for various reasons.

Among others he claimed that he was entitled to a moiety in the sum of $28,000, which he had collected as the twenty per centum additional duty arising under the provisions of the Act of 1846, upon undervaluation.

The Circuit Court, passing upon this claim, said:

> "We consider the case of Ring vs. Maxwell, 18 How., 147, as determining that the sum so demanded by the defendant did not accrue from fines or penalties, but was composed of duties chargeable by law on the merchandise imported."

This was the sole ground upon which the Circuit Court denied Collier's claim to a moiety; namely, that Ring vs. Maxwell was authority for the proposition that the 20% penalty was a duty and not a penalty.

But with all due respect to the Circuit Court, the case of Ring vs. Maxwell did *not* hold anything of the sort. The Supreme Court there held that the 20% was not a penalty, *for the purpose of being distributed among the officers of customs*, and it so held *because* the Act of 1846 expressly declared that the 20% *should not be construed to be a penalty for the purpose of distribution.*

The Supreme Court there held:

> "We do not find it necessary to determine whether these additional duties might have been deemed penalties, so as to come under

> the terms of either of the collection laws, which have directed the distribution of penalties among certain officers of the customs * * *.
>
> Because in our opinion *whatever may be the nature of the sums levied*, as additional duties, under the 8th section of the tariff act of 1846, they are not distributable as penalties."

The Court then proceeds to point out that Section 17 of the Act of 1842 first provided for a penalty of fifty per centum for undervaluation; that Section 26 of the same Act provided for the distribution, collection, remission, etc., of those penalties, in accordance with existing law; that the 8th Section of the Act of 1846, which imposed a 20% penalty, was a substitute for the 17th Section of the Act of 1842; and that the 26th Section of the Act of 1842, being still in force, the argument that the 20% penalty was distributable, had "great force" (page 149).

The Court adds that it

> "accedes to the position * * * that whatever rule was in force when the Act of 1846, was passed, concerning the distribution of the additional duty levied by the 17th section of the Act of 1842, is also in force and applies to the additional duty under the 8th section of the Act of 1846, which is here in question. So that the only remaining inquiry is, what was that rule?"

The Court then states that the question is answered by the provisions of the 3d section of the Act of February 11, 1846 (9 Stats. at Large, 3), which contained the express provision

> "that no portion of the additional duties provided for by the 17th section of the Act of August 30, 1842, entitled, &c., shall be

deemed a fine, penalty or forfeiture, *for the purpose of being distributed to any officer of customs;* but the whole amount thereof, when received, shall be paid directly into the Treasury."

The Court then points out that as this rule was in force at the time the Act of 1846 was passed, it necessarily follows that the sums in question were not distributable. In conclusion the Court adds:

> "The fallacy of the argument, on the part "of the complainants, consists in going back "to former laws concerning the distribution of "*other* penalties, and considering them to be "applicable to *this penalty*, when the exist- "ing law applicable in terms to a penalty "*ejusdem generis*, and for which *this penalty* "is a substitute, declares that it is not dis- "tributable (p. 151).

All that was decided in Ring vs. Maxwell, therefore, was that the amount in question was not a penalty for a particular purpose, *because* the existing statute expressly declared that it should not be deemed a penalty for that purpose.

But it was by no means held that it was not a penalty for any other purpose; nor was it held that it was a duty. On the contrary, as appears by the language above quoted, the Court clearly and emphatically recognizes it to be a penalty; over and over again calls it a penalty; compares it with other penalties, and points out that it would be within the law in relation to *other penalties of the same kind*, if it were not for the express provisions of the statute to the contrary.

Moreover it will be noted that the Court expressly holds that the sum in question is a penalty in so far as the laws for the collection, recovery and remission of penalties is concerned, but that so far as the distribution is concerned, it is ex-

cluded from those laws, because of the statute quoted; the Court states (p. 150):

"It is obvious that it must have been intended that those existing laws should be thus applied; and this can only be effected by considering the duties and *penalties* levied by the Act of 1846, as substitutes for and to be governed by the same rules, as the corresponding duties and *penalties* levied by the Act of 1842, which did, in terms, adopt and apply the existing laws for the recovery, collection and distribution of duties *and penalties*."

It is equally plain that the rule of *expressio unius est exclusio alterius* was in the mind of the Court, and that as a consequence of this rule the direction of Congress that this amount should not be deemed a penalty for a particular purpose, clearly implied that it should be considered a penalty for all other purposes.

(*f*) Although the Tariff Act of 1897 has no direct bearing on this case, having been passed after these importations were made, it is proper to note some of its provisions, particularly in view of the rule laid down in Ring vs. Maxwell. Section 32 of the Act of 1897 amended Section 7 of the Act of June 10, 1890, as follows:

> "And if the appraised value of any article of imported merchandise subject to an *ad valorem* duty * * * shall exceed the value declared in the entry, there shall be levied, collected and paid, *in addition to the duties imposed by law* on such merchandise, *an additional duty* of one per centum of the total appraised value thereof for each one per centum that such appraised value exceeds the value declared in the entry, but the *additional duties* shall only apply to the particular article or articles in each invoice that are so undervalued, or shall be limited to fifty per centum of the appraised value of such article or articles."

Thus far the Act of 1897 is substantially the same as the similar provision in the Act of 1842, Section 17, and the amount of the penalty is again reduced to the maximum of fifty per centum; again does Congress term this amount an "additional duty;" but again we must look to the substance rather than the form and see that it is still the same *penalty* that was before the Supreme Court in Ring vs. Maxwell and the other cases above cited.

But Section 32 then proceeds to lay down an additional and new rule in respect to these so-called additional duties which may thereafter accrue. Having declared in 1842 that a similar provision should not be deemed to be a penalty for the purpose of distribution among customs officers, Congress now proceeds to declare that these sums shall not be construed to be penalties *for the purpose of remission*, except in cases of manifest clerical error.

Section 32 further provides that:

> "Such additional duties shall *not be con-*
> "*strued to be penal, and shall not be remitted*,
> "nor payment thereof in any way avoided,
> "*except in cases arising from a manifest*
> "*clerical error*, nor shall they be refunded in
> "case of exportation of the merchandise, or
> "on any other account, nor shall they be sub-
> "ject to the benefit of drawback. * * *"

The language used clearly indicates that Congress recognized the fact that these sums were penalties, because it provided that they shall not be remitted, and, as has been shown, no duty could be lawfully remitted; no statute authorizing remission of *duties* was or is in existence. But being *penalties*, then, of course, they are within the remission statutes—and may be remitted, unless Congress expressly declares that they may not be remitted.

Congress thereupon reduces the penalty by one-half, as compared with the prior act, but declares that the so-called additional duties shall not be construed to be penal, shall not be remitted, nor shall they be refunded by way of drawback upon exportation.

All these restrictions and limitations are undoubtedly within the power of Congress. It might well say that no forfeiture, no fine or no penalty might be remitted under any circumstances; but that would not change the character of the fine, or the penalty or the forfeiture; in each case it would be precisely the same as before. If Congress were to declare that no one might be pardoned for an offense committed, it would not alter the fact that an offense had been committed, nor would it change the name or description either of offense or punishment.

So under the Act of 1897, while Congress has the power to say that the penalties shall not be remitted nor payment in any way avoided, nor refunded, the exercise of such power does not and cannot change in any way the essential character of the thing; it is still a penalty; it is still a punishment inflicted for the violation of the law; it is still *not* a duty, and Congress cannot make it a duty by terming it an "additional" duty, any more than it could by calling it a "supplemental" or "extra" duty. That which is by its very nature a *fine* inflicted for violation of law cannot be any the less so because it is called something else.

In conclusion, while it is not directly involved in the question certified, it is important to note that in this very case the Secretary of the Treasury, as hereinbefore mentioned, actually remitted one-half of this particular penalty. It is true that

subsequently he sought to revoke his decision, because it had become necessary to sue Helwig for the unremitted portion of the penalty; but that does not in any way effect his original decision that it was a penalty; in fact, it emphasizes the view of the Treasury Department that the sum was one which was within the statute affecting penalties.

At the proper time and place and in a Court which has jurisdiction of this action, it can very properly be urged that the decision of the Secretary necessarily found that the penalty was incurred without wilful negligence or intent to defraud, and that decision *ipso facto* remitted the entire amount. It can there also be urged that the subsequent attempt by the Secretary to "revoke" that finding and decision, merely because it had been found to be necessary to sue Helwig for the half of the penalty, not specifically remitted, was entirely void. Were this not so, a decision of the Secretary of the Treasury remitting penalties would have no value whatever, as he might at any time and for any reason, however arbitrary and whimsical, "revoke" it; had Helwig paid the $4,533.84, the Secretary might even then, had he so pleased, have revoked his decision and called upon Helwig to pay the balance.

But these are questions which are pertinent in an action begun in a proper Court, rather than in respect to the question certified.

POINT THREE.

The question of the United States Circuit Court of Appeals should be answered in the negative.

HENRY W. RUDD,
Counsel for Plaintiff in Error.

APPENDIX.

I.

Opinion of Hon. Richard Olney, Attorney-General, holding that these "further sums" are penalties. (20 Opinions, 660.)

Department of Justice,

Washington, D. C., September 9, 1893.

Sir:—

I have given careful consideration to the questions raised by your communication of August 11, relating to the remission of penalties by the Treasury Department. I understand that you desire no opinion as to the case of the Madison Square Garden Company. This leaves two questions to be answered.

First. The first question you ask is whether the so-called "additional duties" provided for by Section 7 of the Customs Administrative Act of June 10, 1890, Chapter 407, are penalties within the meaning of Sections 5292-3 of the Revised Statutes and Sections 17 to 20 of the Anti-Moiety Act of June 22d, 1874, Chapter 391.

Although this question was substantially decided in the affirmative by the Attorney General under prior acts of like import as long ago as 1843, yet recent rulings of the Secretaries of the Treasury have been to the contrary, supported by an opinion of the Solicitor of the Treasury rendered in 1886. While these rulings have not established a practice so continuous as to govern the statutory construction, yet, as I adhere to the opinion expressed by my predecessor, they call for a more extended discussion of the subject than is usual in opinions rendered by this Department.

Section 7 of the act of 1890 provides as follows:

"And if the appraised value of any article of imported merchandise shall exceed by more than ten per cent. the value declared in the entry, there shall be levied, collected and paid, in addition to the duties imposed by law on such merchandise, a further sum equal to two per cent. of the total appraised value for each one per cent. that such appraised value exceeds the value declared in the entry; and the additional duties shall only apply to the particular article or articles in each invoice which are undervalued; and if such appraised value shall exceed the value declared in the entry more than forty per cent., such entry may be held to be presumptively fraudulent, and the collector of customs may seize such merchandise and proceed as in cases of forfeiture for violations of the customs laws."

The sections above cited from the Revised Statutes and the Anti-Moiety Act of 1874 provide procedure by which "any fine, penalty or forfeiture" may be remitted in a proper case by the secretary of the treasury. This system of remission has come down with some changes of detail from the Act of March 3, 1797, Chapter 13. The power of remission applies by Section 5292 of the Revised Statutes to "any person who shall have incurred any fine, penalty, forfeiture or disability * * * by authority of any provisions of law for imposing or collecting any duties or taxes;" * * * by Section 5293 to "a fine, penalty or forfeiture;" by Section 17 of the Act of 1874 to "any person who shall be charged with having incurred any fine, penalty, forfeiture or disability other than imprisonment." The Act of 1797, under which the opinion of my predecessor above referred to

was given, relates to "any person or persons who shall have incurred any fine, penalty, forfeiture or disability * * * by force of any present or future law of the United States for the laying, levying or collecting any duties or taxes." * * * There is no doubt that if the "additional duty" is a penalty, these provisions apply to the case, as they are to be construed as forming with the Act of 1890 one complete system of tariff legislation.

On principle it is clear that the so-called "additional duty" is a penalty. It is not provided for the purposes of revenue. It is no less a penalty because proof of fraud or other wilful misconduct is not a necessary preliminary to its infliction. It is in its essence a fine inflicted to promote honesty; nor is it less a penalty because it is called something else. The law looks at facts, not names. As will be shown, it was in fact called a penalty when it first appeared in the statute book. The results of the contrary construction would be most unreasonable, and, therefore, to be avoided if possible. One result would be that the Secretary of the Treasury could remit when fraud was charged, otherwise not. If the increase of valuation on the appraisement amounts to 40 per cent., the goods may be seized for presumptive fraud, according to the express provisions of the law, and then the Secretary's power of remission attaches. If, however, the increase in valuation by the appraisement is between 10 and 40 per cent. only, then, according to the construction adopted by the Treasury Department, no seizure can be made unless there is some positive indication of fraud. If there are indications of fraud, a seizure can be made, followed by a remission. If there are no indications of fraud, there can be no remission, because there can be no seizure. Such intent

should not be imputed to Congress except in a very clear case.

It now remains to trace the history of the statutory provisions and consider decisions of the Courts and the opinions of the Attorneys-General under the language of the older statutes.

The "additional duties" of the Act of 1890 originated as early as the Act of April 20, 1818, Chapter 79. Section 11 of that act, after providing for appraisal of goods subject to *ad valorem* duties on suspicion of undervaluation, enacts that "if the value at which the same shall be appraised shall exceed by twenty-five per cent. the invoice prices thereof, then in addition * * * there shall be added fifty per cent. on the appraised value on which aggregate amount the duties on such goods, wares and merchandise shall be estimated." In this and other early acts the penal duty was arrived at by the method of enlarging the basis on which the *ad valorem* duty was computed, not as now by simply increasing the percentage of the duty.

Section 25 of this act enacted "That all *penalties and forfeitures* incurred by force of this act shall be *sued for*, recovered, *distributed* and accounted for in the manner prescribed by" the Act of March 2, 1799, "and may be *mitigated or remitted* in the manner prescribed by" the Act of March 3, 1797. Attorney-General Wirt, in his opinion of February 19th, 1821 (5 Op., 730), ruled that the 50 per cent. could not be remitted; but this was because he thought Congress to have "confined the mitigating and remitting power of the Secretary of the Treasury to such penalties and forfeitures as are, according to the provisions of the act, to be recovered *by suit*." This construction would have prevented the distribution of moieties out of this 50 per cent. among the

customs officers; it seems either to have been retracted or disregarded, with the subsequent approval of the Supreme Court (Bartlett v. Kane, 16 How., 263, 274).

The act of March 1, 1823, Chapter 21, Section 13, repeated the language quoted from Section 11 of the former act, adding the following words: "*Provided*, That nothing herein contained shall be construed to impose *the said penalty of fifty per cent.* for a variance between the *bona fide* invoice of goods produced in the manner specified in the proviso of the fifth section of this act and the current value of the said merchandise in the country where the same may have been originally manufactured or produced." The fifth section referred to "*the penalty* provided for in the thirteenth section of this act."

The Tariff Act of May 19, 1828, provided in Section 8 for an appraisal in all cases of goods subject to *ad valorem* duties, or to any other duties regulated according to the value of the article, and enacted in Section 9, that where the appraised value "shall by ten per cent. exceed the invoice value thereof, in addition to the duty imposed by law on the same, if they had been invoiced at their real value, as aforesaid, they shall be levied and collected, on the same goods, wares and merchandise; fifty per cent. of the duty so imposed on the same goods, wares and merchandise when fairly invoiced; *Provided, always*, That nothing in this section contained shall be construed to impose the said last mentioned *duty of fifty per cent.* for a variance between the *bona fide* invoice of goods produced in the manner specified in the proviso to the eighth section of this act, and the current value of the said merchandise in the country where the same may have been originally manufactured or produced; *and*

further, that the *penalty of fifty per cent.* imposed by "the Act of 1823" shall not be deemed to apply or attach to any goods, wares or merchandise which shall be subject to the additional *duty of fifty per cent.*, as aforesaid, imposed by this section of this act."

It will be noticed that this first proviso is substantially a copy of the proviso in the act of 1823, only changing the word "penalty" to "duty," but that in referring to the former act it still retains the word "penalty." The change of the wording was probably made, in accordance with the extreme high tariff policy of the framers of this famous act, to prevent a strict construction in favor of the importer. This purpose failed, as we shall see, if it ever existed, for the Supreme Court looked through the name at the substance of the thing, and found it to be still a penalty, as unconsciously confessed by the legislators in this second proviso.

The tariff act of August 30, 1842, Chapter 270, Section 17, repeated the language of Section 9 of the act of 1828, but without the provisos. By Section 26 prior laws as to "the recovery, collection, distribution and remission of all fines, penalties and forfeitures," were continued as if re-enacted.

It was under this act that the opinion of Attorney-General Legare was asked by the Secretary of the Treasury whether he had power to remit the 50 per cent. as a penalty within the meaning of the act of 1797. This question was answered in the affirmative on June 7, 1843 (4 Op., 182), the Attorney-General stating that he was "very clear that the 50 per cent. * * * is a penalty."

The "act relative to collectors and other officers of the customs" of February 11, 1846, Chapter 7,

impliedly recognized the correctness of this opinion by providing that "no portion of the additional duties provided by" the act of 1842, Section 17, "shall be deemed a fine, penalty or forfeiture *for the purpose of being distributed to any officer of the customs*, but the whole amount thereof, when received, shall be paid directly into the Treasury."

The Tariff Act of July 30, 1846, Chapter 74, Section 8, after providing for entry and appraisement of imported goods, enacted that "if the appraised value thereof shall exceed by ten per cent. or more the value so declared on the entry, then in addition to the duties imposed by law on the same, there shall be levied, collected and paid a duty of twenty per cent. *ad valorem* on such appraised value." This Act was held not to repeal the administrative provisions of customs laws not expressly re-enacted (Ring v. Maxwell, 17 How., 147).

In Greely v. Thompson (10 How., 225) and Maxwell v. Griswold (*id.*, 242) a strict construction was placed by the Supreme Court on these provisions of the Acts of 1842 and 1846, respectively, on the ground that they were penal in nature. In Bartlett v. Kane (16 How., 263, 274), the Court called the twenty per cent. under the latter Act an "amercement," and held that, not being a duty in the true sense of the word, its return could not be demanded upon re-exportation. Speaking of these "additional duties," Mr. Justice Campbell said that "they were enacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty. In several of the acts this additional duty has been distributed among officers of the customs upon

the same condition as penalties and forfeitures. As between the United States and the importer, and in reference to the subject of drawback and debenture, it must still be regarded in the light of a penal duty" (see also Ring v. Maxwell, 17 How., 147) 150–1; Stairs v. Peaslee, 18 *id.*, 521, 527–529; Belcher v. Lawrason, 21 *id*., 251, 256; Tappan v. United States, 2 Mason, 393, 402; Swanston v. Morton, 1 Curt., 294; Kriesler v. Morton, 2 *id.*, 239; 17 Op., 268; *id.*, 436).

The Act of June 30, 1864, Chapter 171, Section 23, in terms re-enacted the provision above quoted from the Act of 1846, and Section 22 continued all existing laws. Section 23 was repealed, but re-enacted in this particular, by the Act of March 3, 1865, Chapter 80, Section 7, and its language was incorporated in Section 2900 of the Revised Statutes, which remained the law until the enactment of the Customs Administrative Act of 1890, now in question. Under the latter, as under its predecessors, the so-called "additional duty" is recognized by the Supreme Court to be a penalty (Passavant v. United States, 148 U. S., 214, 218, 221, 222).

I am, therefore, constrained to hold that, being a penalty, it is subject to remission like other fines, penalties and forfeitures.

Second. The second question presented by you relates to the seizure of the paintings of Mr. E. Roberts for alleged undervaluation. It appears that Mr. Roberts had paid duties upon part of his importation and entered the remainder free as "antiquities." After the seizure the importer failed to take the proceedings provided for the case of persons dissatisfied with the appraisement or classification of their merchandise. Instead, he brought a proceeding under Section 5292 of the Re-

vised Statutes and the Act of 1874 for a remission of the forfeiture. A summary investigation was had before a United States commissioner, who certifies the evidence to you, and finds that the pictures entered as "antiquities" were entitled to free entry as such, and that the value of the other articles as declared in the invoice is greater than their true market value in the country of production. You ask to be advised as to the weight and effect of this proceeding and of the findings of the commissioner, and as to any action which it is incumbent for you to take under the circumstances. I can only answer this question so far as it relates to your power to remit in the premises.

I do not understand that you question your own power to remit the forfeiture upon payment of the proper duties as estimated upon the appraised value of the pictures. Your doubt concerns the right to remit also in this proceeding the difference between the duties actually paid at the time of importation, and the duties as they would be assessed were the appraisement and classification by the custom house authorities assumed to be correct. It is evident that such a remission would be equivalent to a reappraisement by a United States commissioner and the Secretary of the Treasury, instead of in the manner provided by the Customs Administrative Act. Were such a practice established, importers would substantially have a choice of forum. They could appeal either to the Board of General Appraisers, or to yourself, through the United States commissioner, in remission proceedings. I do not think that any such position is tenable. The sums assessed by the custom house authorities (exclusive of the amercement under Section 7 of the Customs Administrative Act) are in no sense penalties, but are duties in the strict sense of the term, however erroneously ar-

rived at. I therefore advise that you have the power to remit the forfeiture, but only on payment of the duties as so estimated.

Very respectfully,

Richard Olney,
Attorney-General.

The Secretary of the Treasury.

II.

Extract from "Table V, Penal duties remitted by the Secretary of the Treasury, since January, 1891, under Sections 5292 and 5293 Revised Statutes, as amended by Sections 17, 18 and 19 of the Act of June 22, 1874."

(Report for 1895, Table V, pages CLVII to CLXI.)

The table mentioned which covers several pages of the report, states the port, the nature of the merchandise, the date of remission and the amount remitted. At page CLXI is found the following:

Recapitulation.

Port	Amount	Number of Cases.
New York, N. Y.	$181,809.91	239
Buffalo, N. Y.	567.00	2
Chicago, Ill.	38,832.70	29
Detroit, Mich.	337.50	1
Philadelphia, Pa.,	4,951.12	7
Pittsburg, Pa.,	1,140.48	1
San Francisco, Cal.	179.35	1
St. Louis, Mo.	1,836.78	3
Boston, Mass.	5,765.04	19
Springfield, Mass.	1,282.61	2
	$236,702.49	304

Extract from "Table S, Penal Duties remitted by the Secretary of the Treasury, since January 1, 1896, under Sections 5292 and 5293, Revised Statutes, as amended by Sections 17, 18 and 19 of the Act of June 22, 1874."

Remissions on sugar not included, the Courts having decided that penal duties do not accrue on sugar invoiced conditionally.

(Table S, pages CLIV to CLVII, Report for 1896.)

At page CLVII, is found the following:

Recapitulation.

Port	Amount	Number of Cases
New York, N. Y.,	$79,528.92	138
Baltimore, Md.,	8,933.50	3
Boston, Mass.,	6,659.68	23
Buffalo, N. Y.,	112,883.58	5
Chicago, Ill.,	1,211.04	3
Detroit, Mich.,	139.84	2
Eagle Pass, Tex.,	1,445.00	2
New Orleans, La.,	49,016.09	1
Philadelphia, Pa.,	2,690.06	7
	$262,507.62	184

Extract from "Table P, Penal Duties remitted by the Secretary of the Treasury from November 12, 1896, to October 31, 1897, inclusive, under Sections 5292 and 5293, Revised Statutes, as amended by Sections 17, 18 and 19, Act of June 22, 1874."

(Table P, pages CXLI to CXLIV, Report for 1897.)

At page CXLIV is found the following:

Recapitulation.

Port	Amount	Number of Cases.
New York, N. Y.,	$124,667.91	135
Boston, Mass.,	44,742.46	23
San Francisco, Cal.,	1,084.60	1
Bangor, Me.,	2,549.78	1
Chicago, Ill.,	1,936.32	6
St. Louis, Mo.,	1,422.30	6
Philadelphia, Pa.,	5,770.62	4
St. Paul, Minn.,	460.48	2
Buffalo, N. Y.,	414.89	2
Baltimore, Md.,	407.16	3
Cleveland, Ohio,	130.76	1
Houlton, Me.,	122.32	1
Cincinnati, Ohio,	48.00	2
	$183,757.60	187

Summary.

Report for 1895,	$236,702.49
Report for 1896,	262,507.62
Report for 1897,	183,757.60
	$682.967.71